

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1729

ADOPTION OF FATIMA.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The mother appeals the termination of her parental rights to her then four year old daughter, now living with the paternal grandmother, the preadoptive parent. The mother argues that the Department of Children and Families (department) did not present clear and convincing evidence that she is unfit, that termination is not in the child's best interests, and that the judge abused her discretion in setting a minimum of only two postadoption visits per year. We affirm.

A decision to terminate parental rights involves two steps. See Adoption of Nancy, 443 Mass. 512, 515 (2005). First, the judge must find by clear and convincing evidence that the parent is unfit to perform the responsibilities necessary to care for the child. Id. "Subsidiary findings must be supported by a preponderance of the evidence . . . , and none of the findings will be disturbed unless clearly erroneous." Id. Second, if

¹ A pseudonym.

unfitness is established, the judge must determine whether it would be in the child's best interests to sever all legal ties between her and the parent. Id.

1. Unfitness. The record amply supports the judge's findings of fact, which together establish the mother's unfitness by clear and convincing evidence. For a parent to be deemed unfit, her behavior must "place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child." Adoption of Olivette, 79 Mass. App Ct. 141, 157 (2011), quoting Care & Protection of Bruce, 44 Mass. App. Ct. 758, 761 (1998). "Parental unfitness must be determined by taking into consideration a parent's character, temperament, conduct, and capacity to provide for the child in the same context with the child's particular needs, affections, and age." Adoption of Mary, 414 Mass. 705, 711 (1993).

Here, the mother's unfitness was clearly and convincingly established by her longstanding and unresolved history of substance use, involvement in domestic violence, inability to obtain stable housing, and failure to meaningfully engage with her service plans. The mother's history of substance use dates back to her early teens. After the child was born in 2013, the mother used heroin while caring for her, sometimes failing to

get her out of bed.² Since that time, and during the pendency of this case, the mother has been inconsistent in her attempts at treatment and unsuccessful in recovery. Between 2015 and 2017, the mother's then boyfriend saw her use heroin or illegally obtained prescription medication several times. With her boyfriend's help, the mother attempted to falsify various drug screens. She also admitted to using nonprescribed Klonopin in March 2017, refused to submit to a drug screen in July 2017, attempted to obtain drugs from a childhood acquaintance in August 2017, and tested positive for PCP in December 2017. While the mother testified that she had abstained from using heroin since May 2017, the judge did not credit her testimony and found that, historically, she has not been a reliable reporter. The judge properly considered these ongoing substance-use issues in assessing the mother's fitness. See Adoption of Anton, 72 Mass. App. Ct. 667, 676 (2008); Adoption of Serge, 52 Mass. App. Ct. 1, 6-7 (2001).

Also of concern to the judge was the domestic violence that marked the mother's significant relationships. First and foremost, it was proper for the judge to consider three incidents of physical abuse committed by the mother against the

² The judge was also allowed to consider for prognostic value the mother's admission that in April 2017 she cared for the child's younger half-sibling (not a subject of the present case) while under the influence of heroin.

child herself, with all three incidents occurring in the brief period of time when the young child was returned to the mother's custody for three months.³ In addition, the judge could consider evidence that the mother and the child's father were mutually abusive toward each other, that the mother was abusive toward the maternal grandmother, and that the mother had been violent toward her most recent boyfriend, once punching him and breaking his nose. "[P]hysical force within the family is both intolerable and too readily tolerated, and . . . a child who has been either the victim or the spectator of such abuse suffers a distinctly grievous kind of harm." Custody of Vaughn, 422 Mass. 590, 595 (1996). See Adoption of Elena, 446 Mass. 24, 32 (2006). Of note, the evidence showed that the child's younger half-sibling witnessed some of these incidents or was nearby when they occurred. The judge could rely on that evidence in finding that the mother lacked insight into how domestic

³ Those incidents were as follows: the mother grabbed the child by her hair while she ran, pulling "a big chunk" of it out; held the child down on her stomach while the child cried, causing the mother's boyfriend to pull the mother away and tell her she needed to "cool down"; and spanked the child for a "smart" remark, well after the fact, because it hurt the mother's feelings. With regard to this last incident, though the mother argues that she had the right to use spanking as discipline, the judge explained why spanking was not "appropriate discipline" in that situation -- given the child's age, among other reasons -- and found that it showed the "[m]other's lack of insight/maturity."

violence puts her children at risk. See Custody of Two Minors, 396 Mass. 610, 621 (1986).

The judge also properly considered the evidence that the mother did not have stable and appropriate housing for the child. See Adoption of Anton, 72 Mass. App. Ct. at 676. At the time of trial, the mother had just entered a residential treatment program that would not allow the child to live with her and had not taken any active steps to develop a plan for reunifying with the child. She had no employment or other income that would enable her to obtain stable housing. By contrast, as the judge found, the child has thrived in the paternal grandmother's stable home, and her behaviors have improved as a result of the paternal grandmother's thorough knowledge of her special needs. See Adoption of Terrence, 57 Mass. App. Ct. 832, 835 (2003) (judge properly considered child's "dramatic improvement since his placement in foster care").

Finally, it was appropriate for the judge to consider that the mother failed to comply with the nine service plans created for her, spanning a period of over three years. See Adoption of Rhona, 63 Mass. App. Ct. 117, 126 (2005). Each plan tasked her with, among other things, maintaining sobriety, participating in drug treatment and anger management, meeting regularly with her social worker and counsellor, and maintaining safe and

appropriate housing. The record abundantly supports the judge's determination that the mother did not meaningfully engage with those tasks.

The mother argues that the above evidence does not clearly and convincingly establish her unfitness because there is no nexus between her substance-use issues and a risk of harm to the child. We disagree. As noted, the mother used heroin while caring for the child and sometimes would not get the child out of bed because the mother was under the influence of the drug. Moreover, the judge's determination of unfitness was not based on the mother's substance-use issues alone, but on the constellation of factors just described, which combined to place the child at risk of harm. We conclude that the judge's findings regarding the mother's parenting deficiencies are well supported by the record and establish a nexus to her unfitness by clear and convincing evidence. See Adoption of Mario, 43 Mass. App. Ct. 767, 771-773 (1997).

2. Termination of parental rights. "We give substantial deference to a judge's decision that termination of a parent's rights is in the best interest of the child, and reverse only where the findings of fact are clearly erroneous or where there is a clear error of law or abuse of discretion." Adoption of Ilona, 459 Mass. 53, 59 (2011). In making such a decision, "[a] judge may consider evidence that provides a 'reason to believe

that a parent will correct a condition or weakness that currently disables the parent from serving his or her child's best interests.'" Id., quoting Adoption of Carlos, 413 Mass. 339, 350 (1992). Because the interests of the child are paramount, however, predictions of future fitness must rest on "credible evidence" of the likelihood of improvement, not on a "faint hope." Adoption of Inez, 428 Mass. 717, 723 (1999).

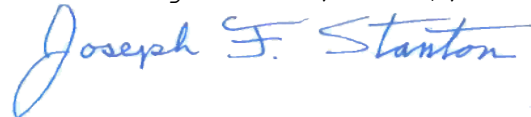
We discern no abuse of discretion in the judge's determination that the mother's unfitness was not merely temporary. In light of the mother's ongoing struggles with substance use and her lack of progress and insight, the judge was warranted in concluding that the child's need for stability and permanency meant that it was no longer in her best interests to continue to wait for the mother to treat her addiction. The mother had several years, most of the child's life, to engage in services to address the issues that put the child at risk, but was unable to do so. "[I]t is not now in [the child's] best interests to ask [her] to wait an unknown additional period . . . in the hopes that [her mother] might eventually engage in a meaningful way in . . . treatment." Adoption of Nancy, 443 Mass. at 517.

3. Visitation. "[T]he decision whether to grant postadoption visits must be left to the sound discretion of the trial judge." Adoption of John, 53 Mass. App. Ct. 431, 439

(2001). The decision is grounded in an assessment of what is in the best interests of the child, but must also take into account the rights of the adoptive parent. See Adoption of Ilona, 459 Mass. at 63-64. Here, the judge was within her discretion to leave it to the paternal grandmother to decide whether additional visits, beyond the court-ordered twice yearly visits, would be in the child's best interests. Adoptive parents "are entitled to the same presumption [as biological parents that] they will act in the best interest of the child in making decisions regarding the child, including decisions about visitation." Id. at 64. Given that the paternal grandmother has a solid understanding of the child's needs, the judge properly presumed that she would act in the child's best interests in determining whether more frequent visits were warranted.

Decree affirmed.

By the Court (Green, C.J.,
Massing & Shin, JJ.⁴),



Clerk

Entered: July 12, 2019.

⁴ The panelists are listed in order of seniority.